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IN THE

Supreme Court of the United States

October Term, 1949

No. 205

D. LEE ANDREWS, *Petitioner*

v.

HAMILTON COUNTY HOSPITAL, et al.

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

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Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

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Your petitioner, D. Lee Andrews, respectfully prays that a writ of certiorari be issued to review a determination by the Supreme Court of the State of Indiana entered in the cause on April 25, 1949. A transcript of the record of the cause, including the proceedings in the Supreme Court of Indiana, is furnished herewith in accordance with Rule 38 of the rules of this Court.

OPINION BELOW

The opinion of the Supreme Court of Indiana (Tr. 294-304) is reported in 84 N. E. 2d 469. The further opinion of the Court denying your petitioner's petition for rehearing (Tr. 308-309) is reported in 85 N. E. 2d 365.

JURISDICTION

The opinion of the Supreme Court of Indiana was delivered March 14, 1949 (Tr. 294), its further opinion denying petitioner's petition for rehearing was delivered April 25, 1949 (Tr. 308), and its judgment was subsequently entered. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257.

QUESTION PRESENTED

Whether the discriminatory and arbitrary refusal by the trustees of a public, state-supported hospital to permit a medical practitioner, fully qualified legally, to use the facilities of the hospital invades rights secured to the petitioner under the federal constitution.

STATEMENT

Petitioner filed his amended complaint (Tr. 11-19) in the Circuit Court of Hamilton County, Indiana, against Hamilton County Hospital, its four trustees, and its superintendent, praying that respondents be enjoined from further denying petitioner, a licensed medical practitioner, and his patients, admission to the public hospital in violation of the constitution and laws of the United States. At the trial of the cause, the following facts were established:

Petitioner, a man 47 years of age at the time of trial (Tr. 83), attended Indiana School of Medicine for four years from 1934 until he received his degree as a Doctor of Medicine in 1938 (Tr. 85; Pet. Ex. 6, Tr. 47-48). He practiced his profession of medicine in Clermont and Indianapolis, Indiana, from 1938 to 1942 (Tr. 40, 85-86) at which latter date he entered the armed forces (Tr. 40). Petitioner was discharged from the Army after two years of service, including a year at the Army's 1750 bed hos-

pital at Fort Knox, Kentucky (Tr. 88), his certificate of service showing that his Army specialty was plastic surgery (Tr. 45). Petitioner then located and practiced his profession in Louisville, Kentucky, for two years commencing January 1945 (Tr. 88-89).

Petitioner holds an unlimited license to practice medicine in Indiana (Pet. Ex. 2, Tr. 43), and he also holds an unlimited license to practice "medicine, surgery and obstetrics" issued by Hamilton County, Indiana (Pet. Ex. 1, Tr. 41-42). He is a member of the Indiana Medical Association and a Fellow in the American Medical Association (Tr. 40). In addition to his other medical qualifications he took, in November 1939, the regular one-month intensive clinical course in general surgery at Harvard University (Tr. 87), and, while in the Army in 1943, a three-months intensive course in maxillo-facial and plastic surgery at Columbia University's post-graduate school of medicine (Tr. 87-88). He has practiced medicine in at least eight hospitals (Tr. 61, 89-90), and, as part of his medical practice since 1938, has performed over three hundred major surgical operations and several hundred minor operations (Tr. 50-52). His educational qualifications to practice medicine have never been questioned by any hospital or any medical society, including the Hamilton County Medical Society (Tr. 98).

In December 1946, while still located at Louisville but while contemplating removal to Noblesville, Hamilton County, Indiana, petitioner visited the respondent hospital and was told by the respondent superintendent that his proposal to locate in Noblesville was "fine" since more doctors were needed (Tr. 52-53). Respondent Hamilton County Hospital is the only hospital in the County, public or private (Tr. 58). In order for petitioner properly to perform his duties, it is necessary that he be allowed to have his patients admitted to it (Tr. 82).

Petitioner moved to Noblesville on January 1, 1947 (Tr. 39). In February 1947 he was permitted to admit a patient to respondent Hospital on his representation that, though not a member of the Hamilton County Medical Society, he was a member of the Indianapolis Society and his application in the Hamilton Society was pending (Tr. 53). Subsequently, petitioner was refused permission to admit patients because of his lack of membership in the Hamilton Society (Tr. 53-56.* This refusal has caused petitioner grave damage and has prevented his taking a number of surgical and medical cases (Tr. 59-60). Neither the superintendent nor any of the four trustees knows of any reason why petitioner should not be permitted to practice medicine and surgery in respondent Hospital (Tr. 147-148; 131, 140; 132; 137; 144).

After arrival in Noblesville in January 1947, petitioner had formally requested that his membership in the Indianapolis Medical Society be transferred to the Hamilton County Medical Society and that he be admitted to that organization (Tr. 48-49). No action was ever taken on this application until September 20, 1947, when petitioner received a notice (Pet. Ex. 7, Tr. 50) that his application for membership in the Hamilton County Medical Society was rejected. No reason was ever given petitioner why he was refused admission to the Society and he knows of no reason whatever therefor (Tr. 98). Except for petitioner, no licensed physician, resident of Hamilton County, has ever been refused admittance to the Society (Tr. 275).

On September 6, 1947, petitioner's counsel formally notified respondents by letter (Pet. Ex. 10, Tr. 107-109) that petitioner would present a patient for admission to the hospital on September 11, and that, if admittance was

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* Petitioner's proffered testimony to relate several conversations had with some of the respondent trustees in his efforts to be permitted use of the hospital, was excluded by the trial court on respondents' objections (Tr. 56-57).

refused, application to the courts for relief would be commenced. On *September 9, 1947,* respondent trustees adopted the "Rules and Regulations for the Government of the Hamilton County Hospital" (Pet. Ex. 8, Tr. 63-80) which are at issue here.

Pertinent portions of those Rules and Regulations, which were relied upon by respondents in denying petitioner use of the Hospital, provide (in partial paraphrase and with emphasis supplied): The active medical staff of the Hospital shall consist of "the Resident Active Medical Staff, which shall include all the physicians having an unlimited license to practice medicine in the State of Indiana and *having membership in the Hamilton County professional organization of fully licensed physicians having the largest number of such physicians residing in Hamilton County.*" (Art. V, Sec. 1; Tr. 67-68). "All appointments to the staff and assignments to services shall be made by the Board of Trustees *but only upon the recommendation of the Active Medical Staff.*" (Art. V, Sec. 2; Tr. 69). "A surgeon desiring to practice surgery *who was not a member of the surgical staff of the hospital according to the records of the hospital on March 1, 1947,*" shall be a member of the staff, have a certificate establishing one year's internship in a hospital approved by the American Medical Association, and shall also have had three years of surgical training meeting the aproval of the American College of Surgeons (Art. VII, Sec. 1; Tr. 75).*

* In theory, petitioner was not flatly denied the right to admit patients to respondent Hospital. Petitioner, though not a staff member, might admit patients subject to all the following conditions: Petitioner must give the respondent's superintendent a written diagnosis of the patient's ailment and the services proposed to be rendered; the superintendent must call in a staff member to check the diagnosis and proposed treatment; the staff member must attend and supervise the rendition of the service or treatment; the patient must pay the staff member the same fee he would have received for rendering the services himself; and the non-staff physician must advise the patient of all requirements, including the patient's obligation for a fee to the staff member. (Art. VII, Sec. 1; Tr. 72-74).

On these facts the trial court found that the material allegations of petitioner's complaint were true, and awarded him the relief sought (Tr. 25-26). The Supreme Court of Indiana affirmed so much of the trial court's judgment as enjoined respondents from denying the petitioner the right to use respondent hospital to practice general medicine, excluding surgery, but reversed so much of the judgment as enjoined respondent from preventing petitioner from doing surgery in the Hospital.

The Supreme Court reached this conclusion on the theory that the rules and regulations were reasonable and lawful in requiring, as a prerequisite to performing surgery, one year's interneship and three years' residency in an approved hospital. It failed to advert to the facts that these requirements were applicable only to physicians *who were not members of the staff on March 1, 1947;* that of 25 physicians residing and practicing in Hamilton County, no more than two would have been qualified to perform any surgery at respondent Hospital but for their membership on the staff prior to March 1, 1947; and that the rules and regulations, adopted in the context of circumstances above described, were patently aimed and designed to deprive petitioner of the use of the respondent Hospital.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Indiana erred:

1. In holding that the issues before it did not transcend a determination as to the reasonableness of the rules and regulations adopted by the respondent trustees for governance of the hospital;

2. In failing to hold that the rules and regulations were arbitrarily and discriminatorily aimed at the exclusion of petitioner from the use of the public hospital;

3. In failing to hold that the restrictions placed on petitioner's use of the public hospital were arbitrary and discriminatory denials of rights assured to the petitioner by the federal constitution and by federal law;

4. In failing to hold that the action taken by respondent trustees deprived petitioner of liberty and property without due process of law and denied him the equal protection of the laws, all contrary to the Fourteenth Amendment to the Constitution of the United States;

5. In partially reversing the judgment entered by the trial court;

6. In denying petitioner the full relief sought.

REASONS FOR GRANTING THE WRIT

I

The present case presents a question of wide public importance. It involves the right of an individual to engage in his chosen profession or pursuit, unobstructed by discriminatory and arbitrary restrictions. In calling upon this Court to confirm his right to pursue his profession on equal terms with others, petitioner is invoking an ancient liberty guaranteed by the federal constitution. The importance of this principle, a heritage of early Anglo-American law (see, e. g., *The Ipswich Taylors' Case,* 11 Coke 53a, 77 Eng. Rep. 1218 (K. B. 1614)), was recognized by this Court early in the history of the Fourteenth Amendment (*Dent v. West Virginia,* 129 U. S. 114, 121):

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions."

It is true that the action of which petitioner here complains is not in form a complete barrier to his pursuit of his profession. But, in practical effect, it approaches its equivalent. The restriction imposed is one on petitioner's use of a public facility (the respondent Hospital) which is obviously essential in the pursuit of his profession. Petitioner, having fully qualified as a medical practitioner, is as much entitled to equality in use of the public hospital as, for example, in the use of the public roads of Indiana.

It is to be emphasized that there is here no issue as to, and we do not challenge, the well-established power of a state reasonably to regulate the qualifications of those desiring to engage in a profession. *Reetz v. Michigan*, 188 U. S. 505; *McNaughton v. Johnson*, 242 U. S. 344; cf. *Hawker v. New York*, 170 U. S. 189. Here petitioner has complied with all the requisites to the practice of his profession which the State of Indiana has seen fit to prescribe. He holds an unlimited license to practice medicine in all its branches in the state. The state prescribes no other qualifications.

It has always been true that the action of county officials, in arbitrarily barring some, but not others, from engaging in their chosen calling, violates rights secured to citizens of the United States by the Constitution. *Yick Wo. v. Hopkins*, 118 U. S. 356. The right of every citizen to follow his chosen calling must be preserved, provided always but provided only that the citizen meet all lawful requisites to engagement in his chosen calling prescribed by the state in the exercise of its police power. Indiana could not, by direct legislative command, deny to petitioner the right to engage in any calling for which he is lawfully qualified. What Indiana cannot do by direct legislative command, its petty county officials cannot effect by indirection.

This Court has not considered in recent years the general principle respecting the freedom of an individual to

engage, on an equal and non-discriminatory basis, in the lawful calling of his selection. *Daniel v. Farm Security Life Ins. Co.*, 336 U. S. 220, considered the dissimilar problem whether a state may prescribe a combination of occupations which the state viewed as an evil. *Liggett Co. v. Baldridge*, 278 U. S. 105, which in any event has only a remote relation to the present cause, is an unsatisfactory precedent because of the criticism directed at its language by this Court in the *Daniel* case. See, also, *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525.

Petitioner respectfully submits that it is time for this Court to reaffirm certain basic principles respecting the individual's liberty to pursue, unfettered by other than lawful state authority, the calling he selects. A case involving principles of this character is necessarily of wide application and great general importance.

II

That arbitrary discrimination was practiced and enforced against your petitioner is not open to doubt. His application for admission to the Hamilton County Medical Society, made in January 1947, as an incident to his effort to be permitted to use respondent Hospital, was responded to only by letter of September 20, 1947. The response then merely stated that petitioner's application was denied. No reason was then or has ever been given why he should not be admitted to the Society.

The action of rejection by the Medical Society was reached at its meeting held on September 9, 1947. On this same date, the respondent trustees of the respondent hospital passed the rules and regulations for governance of the hospital which, in conjunction with the Medical Society's action, had the effect of denying petitioner all use of the Hospital. The significance of the date on which both the Society and the Hosptial took their interlocking action is heightened by the fact that petitioner, through counsel, had served notice on September 6, 1947, that he intended

to force the issue of his right to use the Hospital by presenting a patient for admission to it on September 11, 1947.

To assume, as did the Indiana Supreme Court, that the question before it was merely one as to the reasonableness of the rules and regulations adopted by the respondent trustees, is completely to ignore this context of surrounding circumstances. Petitioner has always predicated his claim for relief against respondents on the ground that unlawful and arbitrary discrimination was practiced against him in violation of his constitutional rights (Amended Complaint, Tr. 12-19; see, particularly, sections III, IV, and VII). The federal question has, thus, always been before the courts of Indiana, and must have been determined adversely to petitioner by the Supreme Court of Indiana in denying him the relief sought.

While that court rejected the palpably illegal rules and regulations which conditioned the right to general use of the Hospital on admission to the County Medical Society, it affirmed those restrictions which deprived petitioner of his right to use the Hospital for the performance of surgery. We submit that the court erred, and denied petitioner fundamental rights, when it considered those restrictions with respect to the practice of surgery merely *in vacuo*. The restrictions applicable to the practice of surgery were part and parcel of a plan designed unreasonably and unlawfully to exclude petitioner from a public institution. They can only be considered and interpreted in the light of the accompanying circumstances which disclose their arbitrary and discriminatory purpose.*

The effect of the Indiana court's decision cannot be escaped on the ground that it constituted merely an incorrect decision as to petitioner's rights, but did not invade rights

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* The mystery as to why respondents determinedly endeavored to bar petitioner from the Hospital is not resolved by the record. As possibly throwing light on this endeavor, the Court's attention is invited to Petitioner's Exhibit 12 (Tr. 246-252), a letter written to petitioner by the attorney for his then wife who was also attorney for the Indiana State Medical Association.

assured to the petitioner by the federal Constitution. It is true that the Fourteenth Amendment does not prohibit discriminations which are merely the "wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial, or executive proceedings." *Civil Rights Cases,* 109 U. S. 3, 17. But here more is involved than wrongful private action.

Respondent Hospital is, for present purposes and in substance, a state institution, and the act of its trustees in arbitrarily excluding petiitoner from its use constitutes state, and not private, action. Respondent Hospital owes its existence to the statutory provisions of the State of Indiana which set forth the manner in which "any county in this state may establish a public hospital." 5 *Burns Indiana Statutes* § 22 - 3215. Among the conditions requisite to the establishment and maintenance of a county hospital is the imposition of an annual tax levy. *Idem.* Bonds may be issued for the support of the hospital (§ 22 - 3223), appropriations from county general funds may be made for its improvement and maintenance (§22 - 3228), and the power to condemn for hospital purposes is conferred (§ 22 - 3225). That Indiana's general policy with respect to its county hospitals is not in conflict with the principles petitioner here invokes is attested by § 22 - 3232, reading in part:

> "In the management of such public hospital, no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Indiana, and all such legal practitioners shall have equal privileges in treating patients in said hospital."

When the four respondent trustees (whose qualifications are also the subject of specific legislative enactment under § 22 - 3217) adopted the rules and regulations upon which they have relied to debar petitioner of his rights, their action constituted state action within the principles established by many decisions of this Court. Discriminatory exclusion from a civic right is within the prohibition of the Fourteenth Amendment though it is the result of discrimi-

natory practices of selection employed by state officials, and not the result of direct statutory command. *Pierre v. Louisiana*, 306 U. S. 354; *Hale v. Kentucky*, 303 U. S. 613; *Norris v. Alabama*, 294 U. S. 587. The issuance of an injunction by a state court in accordance with its common law policy may invade federally-guaranteed rights. *American Federation of Labor v. Swing*, 312 U. S. 321. Judicial enforcement of restrictive private covenants is to be regarded as state action within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U. S. 1, 13-14.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Supreme Court of Indiana should be granted.

July 1949

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IN THE

Supreme Court of the United States

October Term, 1949

No. .....

D. LEE ANDREWS, *Petitioner*

v.

HAMILTON COUNTY HOSPITAL, et al.

MOTION TO DISPENSE WITH PRINTING OF RECORD

Comes now, D. Lee Andrews, petitioner herein, and moves this Honorable Court to dispense with printing of the record in this cause insofar as consideration of the petition for a writ of certiorari is concerned. In support hereof, petitioner respectfully represents:

1. Petitioner has this day filed with the Clerk of this Court his petition for a writ of certiorari to review a determination by the Supreme Court of the State of Indiana. That determination granted in part, but denied in large measure, relief requested by your petitioner against the only hospital in the county where he resides and practices his profession of medicine. Petitioner, under the determination here requested to be reviewed, has been deprived of the right to unrestricted use of this hospital in the practice of medicine. This denial has imposed a serious impediment upon his earning capacity in his chosen profession.

2. The Clerk of the Court has estimated that the cost of printing the record would be approximately $1200. This estimate is based upon the assumption that the transcript of the proceedings below would be shortened and diminished in every feasible manner. The estimated cost of printing the record would be a great burden upon your petitioner.

3. A certified transcript of the record in the cause was filed at the same time as was the petition for a writ of certiorari. The petition makes numerous references to the transcript of the record, and it is believed that this Court will be able to determine the merits of the petition without the assistance of a printed record. Much of the transcript of record, while of arguable relevance upon the ultimate issues should this Court grant the petition for a writ, is not immediately relevant to those considerations which this Court has said are significant in a determination whether or not a writ is to be granted.

4. WHEREFORE, petitioner respectfully prays that the Court dispense with printing of the record insofar as consideration of the petition for a writ of certiorari is concerned.

July 1949

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APPENDIX A

IN THE SUPREME COURT OF INDIANA

HAMILTON COUNTY HOSPITAL, et al.

v.

D. LEE ANDREWS

No. 28535

March 14, 1949

STARR, CHIEF JUSTICE:

The material facts, as shown by the record in this case, are not in controversy. They are as follows: that at all times herein mentioned, there has been in Noblesville, Hamilton County, Indiana, a duly organized county hospital organized pursuant to our statutes covering county hospitals; that on September 9, 1947, this hospital, through its trustees, who are among the appellants herein, adopted, among others, the following rules which are pertinent to this decision:

> "Article V — Medical Staff. Section I. The Hamilton County Hospital Staff as a whole shall be made up of the following groups or divisions; (a) The Active Medical Staff, which shall consist of: (1) The Resident Active Medical Staff, which shall include all the physicians having an unlimited license to practice medicine in the State of Indiana *and having membership in Hamilton County professional organization of fully licensed physicians having the largest number of such physicians residing in Hamilton County . . .*" (our italics) "(d) 2. All appointments to the Staff and assignments to services shall be made by the Board of Trustees *but only upon the recommendation of the Active Medical Staff*. (Our italics) The Board of Trustees will either accept the recommendations of the medical staff or refer it back for further consideration with a statement of its reasons for such action. When final action has been taken by the governing body the superintendent will be authorized to transmit its decision to the candidate and to the chief of staff. . . ."
>
> "Article VII — Choice of Physician or Surgeon —

Section 1. Patients entering the hospital shall have the right to employ the physician or surgeon of their choice; Provided, that such physician or surgeon satisfies the standards of preparation herein stated for the service he is employed to render, and conforms to the following requirements and conditions. (1) He must have an unlimited license to practice medicine in Indiana . . . (3) He must be a member of the Hamilton County Hospital Medical Staff, hereinafter generally referred to as the staff, as constituted under these rules and regulations; or if he is not a member he shall comply with the following provisions: (a) He is required to have with him in the treatment of his case a physician who is a member of the staff and who satisfies the rules and regulations as to qualifications to perform the services appropriate to the care and treatment of the patient. (b) He must, in arranging for admission of his patient, submit to the Superintendent, a written statement of the diagnosis he has made and the service he intends to render. (c) Upon receipt of such written statement, the Superintendent shall call in a member of the staff qualified to render the service mentioned in the written statement, which staff member shall have the right and duty to check the diagnosis and the services the non-staff physician proposes to render; and in event such staff member believes that said diagnosis to be incorrect the proposed treatment to be against the best interest of the patient, he shall so report to the Superintendent who shall transmit and explain to the patient such report. (d) The staff member called pursuant to (c) shall attend and be ready to assist in the rendering of any surgical or other services; and he shall be entitled to receive the same pay as he would receive for rendering the services himself which the patient receives from a non-staff physician and oversees. (e) The patient or the person responsible for the care of the patient who is admitted to the hospital with a non-staff physician attending him, shall be advised by the non-staff physician of all these requirements, including the obligation of the patient to pay the staff member; and the Superintendent shall have authority to make inquiries to determine whether or not such advice has been given and if she finds that it has not, then to give such advice herself. 4. A

surgeon desiring to practice surgery who was not a member of the surgical staff of the hospital according to the records of the hospital on March 1, 1947, shall possess the following qualifications, in addition to those mentioned under 1 and 2: (a) He shall be a member of the staff. (b) He shall have a certificate of interneship showing one year service as an intern in a hospital approved by the Council of Medical Education and Hospitals of the American Medical Association. (c) In addition to interne training required under (b) he shall have had not less than three years of surgical training which meets the approval of the American College of Surgeons.

The facts further reveal that the appellee was at all times referred to herein, duly licensed to practice medicine, surgery and obstetrics in Hamilton County, this state, but has not served an internship or had the required surgical training as required by the rules as a condition precedent to the practice of surgery in this hospital; that he became a resident of Noblesville, Indiana, about January 1, 1947; that shortly thereafter, he applied for membership in the Hamilton County Medical Society which is the "professional organization of fully licensed physicians having the largest number of . . . physicians residing in Hamilton County," as referred to in the above rules; that this application was denied; that the hospital thereupon, in accordance with the above rules, refused to permit the appellee to treat his patients in the hospital unless accompanied by a member of the staff; and finally, that at the time of appellee's application for membership in the medical society he was, and still is, practicing his profession at Noblesville, Indiana.

Appellee brought this action to enjoin the appellants, who are the board of trustees of said hospital and the superintendent of the same, from preventing him from practicing in, and using the hospital. He also named as defendant the Hamilton County Hospital as a legal entity. It has also been named as a party appellant to this appeal. No objection having been made to this irregularity, we will

ignore the same. His complaint, based upon the admitted facts, is on the theory that the involved rules are arbitrary, discriminatory, unreasonable, monopolistic in their nature, and in restraint of trade.

The trial resulted in a finding and judgment in favor of the appellee against the appellants, enjoining them as prayed. It is from this judgment this appeal was taken.

Appellants have assigned as errors the overruling of their demurrer to the complaint, and the overruling of their motion for a new trial.

One ground of demurrer was for defect of parties claiming that appellee's patients were necessary parties plaintiff. The other ground for demurrer was for insufficient facts for the reason that the trustees had the right to adopt rules, and that the above set out rules are reasonable. The motion for a new trial assigns as reasons therefor, that the decision is not sustained by sufficient evidence and is contrary to law.

There is no defect of parties plaintiff. No reputable physician residing in a county of this state having a county hospital, can be discriminated against by such hospital. This is a right which belongs to him and not his patients. Regularly licensed physicians have a right to practice in public hospitals of this state so long as they stay within the law and conform to all reasonable rules and regulations of the institutions. 26 Am. Jur. *Hospitals and Asylums* §9, p. 592; *Henderson* v. *Knoxville* (1928), 157 Tenn. 477, 9 S. W. (2d) 697. In fact the first act which empowered a county of this state to establish a hospital contains the following provision:

> "Any reputable physician residing in any county in this state so establishing or requiring (acquiring) a hospital under this act may have his private patients cared for at such hospital, under the same conditions and upon the same terms that other pay patients are cared for at such hospitals, and such physician shall be permitted to attend and in all things treat his said patients in the manner that to him seems best: Pro-

vided, however, That all physicians shall be subject to the rules and regulations of said hospital, and said rules and regulations shall be the same to all physicians by this act authorized to have their patients cared for at said hospital." § 22-3208 Burns' 1933 (Acts 1903, ch. 86, § 8, p. 167)

The rulings of the trial court in overruling the second ground of demurrer, and overruling the motion for a new trial, present the same questions, as the facts proved in support of the complaint are admitted to be true and are the same facts as are alleged in the complaint. We will therefore consider these rulings together.

To require membership of the appellee in the resident active medical staff before permitting him to practice in the hospital, would be a reasonable requirement if such staff were provided for by reasonable rules of the hospital, or the Board of Health through its council, as provided for by our statutes. § 42-1607 et seq. Burns 1940 Replacement, (Supp.), (Acts 1945, ch. 346, p. 1639). We say this in the face of § 22-3232 (Acts 1917 Ch. 144, § 13 p. 527) which among other things provides: "The patient shall have the absolute right to employ at his or her own expense, his or her own physician, and when acting for any patient in such hospital, the physician employed by such patient shall have exclusive charge of the care and treatment of such patient. . . subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of this act." It is our opinion that requiring membership in the staff is such a general rule as is contemplated by the foregoing quoted statute. The present rules, however, provide that the hospital can appoint new members to its staff only upon recommendation of its staff. It would seem by this rule, recommendation to membership may be rejected by the board, but that no one shall be made a member of the staff without such recommendation. This is an unreasonable requirement, as by it the hospital delegates to its staff a virtual veto of its right to perform one of its

duties. By this arrangement the staff dictates what physicians may practice in the hospital. In so holding we are aware that courts of at least one other jurisdiction have approved of staff selection in public hospitals by invitation from their staff. See *Selden v. City of Sterling* (1942) 316 Ill. App. 455, 45 N. E. (2d) 329. With this holding we cannot agree.

It will be further noted that by the involved rules, appellee's right to practice in the hospital is not only conditioned on his being a member of the staff, but also on his being a member of the Hamilton County Medical Society, an extra governmental agency. His admission to this society depends entirely upon the sole determination of the society. *Medical Soc. of Mobile County* v. *Walker* (1944) 245 Ala. 135, 16 So. (2d) 321; *Harris* v. *Thomas* (1920) (Tex. Civ. App.) 217 S. W. 1068; *McKane* v. *Adams* (1890) 123 N. Y. 609, 25 N. E. 1057; 4 Am. Jur. *Associations and Clubs* §11, p. 462. Whether he could ever become a member depends upon conditions beyond his control. By this rule the hospital again delegates its power to determine what physicians may use its facilities. It amounts to a preference in favor of the society and a discrimination against those physicians who by choice or otherwise, are not members of same.

The rule in question relating to surgery which requires a surgeon who was not a member of the staff on March 1, 1947, not only to be a physician licensed by the state, but to have had one year service as an interne in an approved hospital, and three years of surgical training which meets the approval of the American College of Surgeons, as applied to a public hospital such as here involved, is reasonable. We recognize the right of public hospitals to make and enforce reasonable rules for the protection of its patients. In fact such power is expressly conferred by the sections of our statutes above quoted. We judicially know, and the testimony in this case amply illustrates, that a license to practice medicine does not guarantee that the holder thereof is capable of doing surgery. See *Green* v.

City of St. Petersburg (1944) 154 Fla. 339, 17 So. (2d) 517 wherein reasons in defense of this proposition are well stated. It is true that part of what was said in the last cited case seems to have been said on the assumption that the maintenance of a public hospital by a municipality is not a governmental function which is contrary to the law of this state. *Board of Comrs. of Greene County* v. *Usrey* (1943) 221 Ind. 197, 46 N. E. (2d) 823. Nevertheless, without this assumption, the reasoning in the Florida case is sound. In oral argument it was also suggested that this rule as to surgery is discriminatory, as it does not apply to those physicians who were members of the staff prior to March 1, 1947. With this we cannot agree. Similar classifications have been upheld for legislative purposes. *Boliver Twp. Bd. of Fin. of Benton Co.* v. *Hawkins* (1934) 207 Ind. 171, 191 N. E. 158; *Perry Tp.* v. *Indianapolis Power and Light Co.* (1946) 224 Ind. 59, 64 N. E. (2d) 296.

It is our conclusion the complaint states facts which entitle the appellee to some relief; namely, the right to practice general medicine, excluding surgery, in the hospital, without being a member of the staff as here constituted, as membership on this staff can only be increased upon recommendation of the staff and is limited to members of the Hamilton County Medical Society. The demurrer for insufficient facts was therefore properly overruled. As to the sufficiency of the evidence to support the finding, it is our opinion that the appellee is not qualified, under the valid portions of the rules now in force, to perform surgery in the hospital.

We, therefore, reverse that portion of the judgment of the trial court which enjoins the appellants from preventing the appellee from doing surgery in the hospital, and affirm that portion of the judgment which enjoins the appellants from preventing the appellee under the present rules from practicing medicine in the hospital other than surgery.

As the evidence in this case is not in controversy and will not change, we instruct the trial court to enter its finding and judgment in accordance with this opinion.

IN THE SUPREME COURT OF INDIANA

Apr 25 1949

OPINION DENYING PETITION FOR REHEARING

STARR, CHIEF JUSTICE:

In our original opinion we approved the rule of the hospital relating to surgery which required a surgeon to have had one year service as an intern in an approved hospital, and three years of surgical training which meets the approval of the American College of Surgeons. We construe this rule to mean three years of training of the standard approved by the American College of Surgeons. It was an adoption of a certain standard of training which has not been shown to be unreasonable and was not in any sense a delegation of authority to the American College of Surgeons to determine whether that standard had been complied with in each instance — that determination rests with the board of trustees of the hospital.

The petition for rehearing is denied.